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Comments

The California Article 9 No-Deficiency Rule: Undermining the Secured Party's Security

The underlying purpose of article 9 of the Uniform Commercial Code ("UCC") is to provide a single device for regulating security interests in personal property,¹ including the rights of secured parties² and debtors³ in cases of default by the debtor.⁴ The UCC specifically provides that a secured party must give personal notice to the defaulting debtor of the proposed sale of the debtor's collateral and must dispose of the collateral in a commercially reasonable manner.⁵ When the proceeds from the sale of the collateral do not satisfy the debt, the secured party is entitled to a deficiency judgment,⁶ that is, a personal judgment against the debtor for the amount of the debt less the amount realized on the sale of the collateral.⁷ Jurisdictions that have adopted the UCC disagree markedly, however, over the secured party's right to a deficiency judgment when he or she has failed to give notice or to conduct a commercially reasonable sale. Although the California Supreme Court has not addressed this issue, several of the state's appellate courts have held that compliance with the notice and sale provisions is a condition precedent to recovery of a deficiency judgment.⁸

1. U.C.C. § 9-101 official comment (1978).

2. Secured party, defined at U.C.C. § 9-105(m), means "a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold."

3. "'Debtor' means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel papers." U.C.C. § 9-105(d) (1978).

4. *Id.* §§ 9-501 to 9-507.

5. *Id.* § 9-504(3). For the text of this section, see *infra* note 16.

6. U.C.C. § 9-504(2) provides that, "[i]f the security interest secures an indebtedness, the secured party must account to the debtor for any surplus [resulting from sale of the collateral], and, unless otherwise agreed, the debtor is liable for any deficiency." Where the underlying transaction is a sale of accounts or chattel paper, however, the debtor is only liable for a deficiency or entitled to a surplus if the security agreement so provides. *Id.*

7. "'Collateral' means the property subject to a security interest, and includes accounts and chattel paper which have been sold." *Id.* § 9-105(1)(c) (1978).

8. *Western Decor & Furnishing Indus. v. Bank of America*, 91 Cal. App. 3d 293, 308, 154 Cal. Rptr. 287, 294-95 (1979); *General Elec. Credit Corp. v. Bo-Mar Constr. Co.*, 72 Cal. App. 3d 887, 891, 140 Cal. Rptr. 417, 419 (1977); *J.T. Jenkins Co. v. Kennedy*, 45 Cal. App. 3d 474, 481-82, 119 Cal. Rptr. 578, 583 (1975); *Barber v. LeRoy*, 40 Cal. App. 3d 336, 342,

This Comment first briefly reviews the alternative positions taken by courts in states other than California regarding the availability of a deficiency judgment to the secured party who does not comply with the personal notice and sale provisions of UCC section 9-504(3). It then critically examines *Atlas Thrift Co. v. Horan*,⁹ the first California appellate case incorporating the no-deficiency rule into that state's interpretation of the UCC. The Comment concludes that barring the noncomplying secured party from obtaining a deficiency judgment is a punitive remedy contrary to the UCC's policy of providing only compensatory damages.¹⁰ Finally, the no-deficiency rule is found to impose on the cost of credit financing a burden that furthers no useful commercial policy.

The Code and the Courts

Default in the Article 9 Secured Transaction

Part 5 of article 9 of the UCC defines the rights and duties of a debtor and a secured party upon the debtor's default.¹¹ The UCC provides the secured party with several avenues of recourse against the defaulting debtor, including self-help repossession and sale of the collateral securing the debt.¹² If the proceeds from the sale are not enough to reimburse the secured party, the debtor remains liable for the deficiency, unless the parties have agreed otherwise.¹³

Section 9-504(3) requires that the secured party give the debtor¹⁴

115 Cal. Rptr. 272, 276 (1974); *Atlas Thrift Co. v. Horan*, 27 Cal. App. 3d 999, 1009, 104 Cal. Rptr. 315, 321 (1972).

9. 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972).

10. U.C.C. § 1-106(1) (1978).

11. Article 9 does not define default, but allows the parties to determine by agreement the conditions of default. The parties' ability to agree to default terms is limited only by the good faith requirement of U.C.C. § 1-203. "Since payment on time is of the essence of the debtor's obligation, his failure to do so leaves him in default whether the security agreement spells the matter out or not. Beyond that point default is, within reason, a matter of contract and can best be defined as being whatever the security agreement says it is." 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 43.3 (1965). See generally J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 1085-90 (2d ed. 1980) (discussion of what may constitute default in a secured transaction).

12. U.C.C. § 9-501(1) provides that the secured party can reduce the claim to judgment, foreclose, or otherwise enforce his or her interest through judicial procedures; alternatively, the secured party may repossess the collateral, with or without the aid of judicial process, if such a "self help" repossession can be effected without breach of the peace. *Id.* § 9-503. After repossession, the creditor either can resell the collateral at a public or private sale, subject to certain restrictions, *id.* § 9-504(3), or can retain possession of it in satisfaction of the debt, in a procedure known as strict foreclosure. *Id.* § 9-505(2). For an overview of the secured party's remedies under article 9 of the UCC, see J. WHITE & R. SUMMERS, *supra* note 11, at 1090-1110.

13. U.C.C. § 9-504(2) (1978). For the text of this section, see *supra* note 6.

14. The secured party must also give written notice to any other secured party who has

reasonable, personal notice¹⁵ of the time and place of any public sale or

given the secured party notice of a claim of an interest in the collateral before notice has been given to the debtor or before the debtor has renounced his or her right to notice. U.C.C. § 9-504(3) (1978). For the complete text of this provision, see *infra* note 16.

15. The drafters of the UCC intended the notice provision to be flexible and so did not include any statutory time periods or exact methods of giving notice. Official comment 5 to § 9-504 only states that "at a minimum . . . [notice] must be sent in such time that persons entitled to receive it will have sufficient time to take appropriate steps to protect their interests by taking part in the sale or other disposition if they so desire." It was the drafters' judgment that a provision adaptable to the peculiar circumstances of each secured transaction would promote sales under conditions likely to produce fair resale prices. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT NO. 2, at 294-95 (1962). For example, where the collateral is perishable "or threatens to decline speedily in value or is of a type customarily sold on a recognized market," U.C.C. § 9-504(3), no notice need be sent because in the first case delay will result in loss of resale value, and in the second, a sale on a recognized market, such as the New York Stock Exchange, presumptively results in realization of the fair market value of the collateral. See *Wilmington Trust Co. v. Conner*, 415 A.2d 773, 776 (Del. 1980); J. WHITE & R. SUMMERS, *supra* note 11, at 1111. See generally Dorset, *Disposition of Collateral After Default Under the Uniform Commercial Code*, 84 BANKING L.J. 659, 661-63 (1967); Hogan, *Pitfalls in Default Procedure*, 2 U.C.C. L.J. 244, 252-55 (1970); Hudak & Turnbull, *The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral Under the U.C.C.*, 4 WESTERN ST. U.L. REV. 22, 24-25 (1976); Note, *Denial of Deficiency: A Problem of Reasonable Notice Under U.C.C. § 9-504(3)*, 34 OHIO ST. L.J. 657, 666 (1973) [hereinafter cited as *Denial of Deficiency*].

The California legislature amended the reasonable notification of resale provisions of § 9-504(3) in response to criticism that such a vague standard as "reasonable" notice would promote litigation. A definite standard, the legislature thought, would avoid controversy over what constitutes reasonable notice. CALIFORNIA LEGISLATURE, SENATE FACT FINDING COMMITTEE ON JUDICIARY, SIXTH PROGRESS REPORT TO THE LEGISLATURE, PART 1, THE UNIFORM COMMERCIAL CODE 402, 587 (1959-1961). See generally *Atlas Thrift Co. v. Horan*, 27 Cal. App. 3d 999, 1004, 104 Cal. Rptr. 315, 318 (1972).

While specific notice requirements might on first impression seem preferable to the more amorphous provision for *reasonable* notice, the Permanent Editorial Board of the UCC criticized the California amendment. The Board noted that "[o]ne major objective [of the personal notice and commercial reasonableness provisions] was to preserve maximum flexibility for this extremely wide range of collateral. . . . Thus, the general standards of good faith and commercial reasonableness were adopted in preference to rigid mandatory formulae. . . . [The Editorial Board] believes that the elaborate rules relating to notice in the California amendment tend to destroy desirable flexibility . . . and by providing for stereotyped forms of notice in public sales, could well decrease realization on collateral to the detriment of all parties." PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT NO. 2, at 294 (Official Text 1962), *reprinted in* CAL. COM. CODE § 9-504 (West Supp. 1981).

Despite this criticism, the California courts and legislature have preferred more rigid, automatic responses to problems arising in secured transaction defaults than the UCC drafters intended. U.C.C. § 9-504(3) as adopted in California adds the following requirements. Where notice is required, "[s]uch notice must be delivered personally or be deposited in the United States mail postage prepaid addressed to the debtor at his address as set forth in the financing statement or as set forth in the security agreement or at such other address as may have been furnished to the secured party in writing for this purpose, or, if no address has been so set forth or furnished, at his last known address, and to any other secured party at the address set forth in his request for notice, at least five days before the date fixed for any

of the time after which a private sale or other disposition will be made.¹⁶ This section also requires the secured party to dispose of the collateral in a "commercially reasonable" manner.¹⁷ While the UCC does not define commercial reasonableness in absolute terms, one commentator has suggested that the test is whether the sale conforms to the usual practices "among dealers in similar property, or [whether] the property is sold in the usual manner in a recognized market or [whether] the collateral is sold at a price current in a recognized market at the time of sale."¹⁸ The determination of what constitutes reason-

public sale or before the day on or after which any private sale or other disposition is to be made. Notice of the time and place of a public sale shall also be given at least five days before the date of sale by publication once in a newspaper of general circulation published in the county in which the sale is to be held." Additionally, the California version of U.C.C. § 9-504(3) sets forth various requirements for where public resale of the collateral may be held: "Any public sale shall be held in the county or place specified in the security agreement, or if no county or place is specified in the security agreement, in the county in which the collateral or any part thereof is located or in the county in which the debtor has his residence or chief place of business, or in the county in which the secured party has his residence or a place of business if the debtor does not have a residence or chief place of business within this state. If the collateral is located outside of this state or has been removed from this state, a public sale may be held in the locality in which the collateral is located. Any public sale may be postponed from time to time by public announcement at the time and place last scheduled for the sale . . . Any sale in which notice is delivered or mailed and published as herein provided and which is held as herein provided is a public sale."

16. U.C.C. § 9-504(3) provides: "Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale."

17. *Id.*

18. R. HENSON, HANDBOOK ON SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 381 (2d ed. 1979); see U.C.C. § 9-507(2) & official comment 2 (1978). While the notice requirement protects the debtor's and other secured parties' interests in the collateral before disposition, the requirement of commercial reasonableness is an attempt to ensure that the sale is properly carried out. *Denial of Deficiency*, *supra* note 15, at 666. U.C.C. § 9-507(2) does not state that a disposition is commercially unreasonable simply because a better price could have been obtained at a sale at a different time or in a different manner. "Commercial reasonableness" is nonetheless related to sale price. The importance of the requirement "lies in the fact that the amount of the deficiency judgment will be inversely

able notice and commercially reasonable disposition has resulted in some judicial disagreement.¹⁹ The most pronounced division in this area, however, concerns the liability incurred by the secured party who has not complied with the notice and commercially reasonable disposition requirements.

The division among the jurisdictions stems from varied interpretations of the scope of section 9-507(1), which sets out the secured party's liabilities and debtor's remedies for the secured party's failure to comply with part 5 of article 9. This section allows the debtor to petition the court for orders restraining noncomplying sales and gives the debtor²⁰ the right after a sale to actual damages resulting from non-compliance, or, where the collateral is consumer goods, to an automatic recovery whether or not the debtor suffers any damage.²¹ Not all courts, however, have agreed that section 9-507 is the debtor's sole

proportional to the sales price; if the price is high, the amount of the judgment will be low, and vice versa. The 'method, manner, time, place and terms' tests are only proxies for 'insufficient price,' and their importance lies exclusively in their use in guarding against an unfairly low price." White, *Representing the Low Income Consumer in Repossessions, Resales and Deficiency Judgment Cases*, 64 NW. U.L. REV. 808, 818 (1970) (footnote omitted). See also *infra* note 19.

19. For examples of cases discussing the commercial reasonableness requirement, see *In re Zsa Zsa Ltd.*, 352 F. Supp. 665 (S.D.N.Y. 1972), *aff'd without opinion*, 475 F.2d 1393 (2d Cir. 1973) (UCC drafters deferred to case law for development of meaning of commercial reasonableness); *Credit Bureau Metro, Inc. v. Mims*, 45 Cal. App. 3d Supp. 12, 119 Cal. Rptr. 622 (1975) (failure of creditor to use "best efforts" to obtain highest possible sale price resulted in commercially unreasonable sale); *Schatten v. C.I.T. Corp.*, 335 So. 2d 572 (Fla. App. 1978) (evidence that secured party used earnest efforts to secure fair sale price established that sale was commercially reasonable); *Wilkerson Motor Co. v. Johnson*, 580 P.2d 505 (Okla. 1978) (the reasonableness of commercial conduct is to be measured by standards of good faith and fair dealing). See also Hudak & Turnbull, *supra* note 15, at 25-33; White, *supra* note 18, at 817-18; Note, *Uniform Commercial Code: Aspects of a Commercially Reasonable Sale of Repossessed Property*, 19 WASHBURN L.J. 123 (1979).

For examples of cases discussing the reasonable notice requirement, see *Leasing Assoc. v. Slaughter & Son, Inc.*, 450 F.2d 174 (8th Cir. 1971) (mailing notice through regular mail is sufficient); *Edmonson v. Air Service Co.*, 123 Ga. App. 263, 180 S.E.2d 589 (1971) (notice is not "sent" within meaning of UCC unless it was properly addressed, stamped, and mailed); *Citizens State Bank v. Sparks*, 202 Neb. 661, 276 N.W.2d 661 (1979) (notice insufficient which did not identify type of sale or time after which private sale would be made); see also J. WHITE & R. SUMMERS, *supra* note 11, at 1110-14; Siegal, *Commercial Reasonableness in Sales of Collateral*, 49 L.A. BAR. BULL. 9 (1973).

20. Any person who is entitled to notice of the sale or who has notified the secured party of his or her security interest in the collateral before it has been disposed of may also bring an action for damages. For text of § 9-507(1) see *infra* note 21.

21. U.C.C. § 9-507(1) provides: "If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit

protection.²²

Those courts considering the question of remedies available to the debtor when the secured party has not complied with either the personal notice or commercial reasonableness requirements have taken three positions. Some jurisdictions treat noncompliance as a complete bar to a deficiency.²³ Other jurisdictions reject the rule automatically denying a deficiency judgment and limit the debtor to the section 9-507 remedies.²⁴ A third group of courts create a rebuttable presumption that the value of the collateral sold equalled the amount of the debt. The secured party must then produce evidence rebutting this presumption in order to get a deficiency judgment.²⁵

The Article 9 No-Deficiency Rule

Many courts, including those in California, view noncompliance with the personal notice and commercial reasonableness requirements as a complete bar to a deficiency.²⁶ One rationale for this position is that, without notice, the debtor has lost his or her right to redeem the collateral,²⁷ to bid at the sale, or to encourage potential buyers.²⁸ If the

service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price."

22. See *infra* notes 26-34 & accompanying text.

23. See *id.*

24. See *infra* notes 35-40 & accompanying text.

25. See *infra* notes 41-42 & accompanying text.

26. *Skeels v. Universal C.I.T. Credit Corp.*, 222 F. Supp. 696 (W.D. Pa. 1963), *rev'd on other grounds*, 335 F.2d 846 (3d Cir. 1964); *Atlas Thrift Co. v. Horan*, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972); *Wilmington Trust Co. v. Conner*, 415 A.2d 773 (Del. 1980); *Randolph v. Franklin Inv. Co.*, 398 A.2d 340 (D.C. Ct. App. 1979); *Turk v. St. Petersburg Bank & Trust Co.*, 281 So. 2d 534 (Fla. App. 1973); *Braswell v. American Nat'l Bank*, 117 Ga. App. 699, 161 S.E.2d 420 (1968); *Lloyds' Plan, Inc. v. Brown*, 268 N.W.2d 192 (Iowa 1978); *Camden Nat'l Bank v. St. Clair*, 309 A.2d 329 (Me. 1973); *Abbot Motors, Inc. v. Ralston*, 28 Mass. App. Dec. 35 (1964); *Leasco Data Processing Equip. Corp. v. Atlas Shirt Co.*, 66 Misc. 2d 1089, 323 N.Y.S.2d 13 (1971); *Liberty Nat'l Bank v. Greiner*, 62 Ohio App. 2d 125, 405 N.E.2d 317 (1978); *FMA Fin. Corp. v. Pro-Printers*, 590 P.2d 803 (Utah 1979); *Aimonetto v. Keepes*, 501 P.2d 1017 (Wyo. 1972). The Nebraska State Supreme Court has held that failure to give notice bars a deficiency, *Bank of Gering v. Glover*, 192 Neb. 575, 223 N.W.2d 56 (1974), but that a commercially unreasonable sale only results in the fair market value of the collateral being offset against the balance due on the security agreement, *Cornett v. White Motor Corp.*, 190 Neb. 496, 209 N.W.2d 341 (1973). For a general discussion and review of cases on the effect of noncompliance with § 9-504(3), see 1A P. COOGAN, W. HOGAN & D. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 8.06[2] (MB 1982).

27. U.C.C. § 9-506 provides that at any time before the secured party has disposed of the collateral, the debtor may redeem it by tendering the amount of the debt as well as the expenses reasonably incurred by the secured party in repossessing, holding, and preparing the collateral for sale. See generally HENSON, *supra* note 18, at 379-80.

28. See, e.g., *Skeels v. Universal C.I.T. Credit Corp.*, 222 F. Supp. 696, 702 (W.D. Pa. 1963), *rev'd on other grounds*, 335 F.2d 846 (3d Cir. 1964); *Bank of Gering v. Glover*, 192 Neb. 575, 578, 222 N.W.2d 56, 58 (1974); *Commercial Credit Corp. v. Wollgast*, 11 Wash.

debtor has the opportunity to redeem the collateral, to bid at the sale,²⁹ or to produce buyers, a higher purchase price may be obtained, resulting in little or no deficiency. Where the secured party has not given reasonable notice, thus possibly precluding a debtor's right to redeem, the secured party should not be allowed to recover a benefit from his or her wrong by recovering a deficiency judgment.³⁰

Similar reasoning has been used to support the no-deficiency rule where a commercially unreasonable sale is alleged to have occurred. A commercially reasonable sale, one commentator has observed, will result in a more adequate sale price and a smaller deficiency, if a deficiency remains at all.³¹ The secured party, therefore, should not recover a deficiency judgment where the deficiency may have been caused by the manner of the disposition.³²

Courts adopting the no-deficiency rule have also based their decisions on a second rationale. In many jurisdictions, the pre-UCC law barred secured parties who failed to give notice of the sale of repossessed collateral from obtaining deficiency judgments.³³ Because the UCC is silent as to its effect on pre-UCC law governing the debtor's remedies against a misbehaving secured party, these courts have con-

App. 117, 521 P.2d 1151 (1974). See generally 1A P. COOGAN, W. HOGAN & D. VAGTS, *supra* note 26, § 8.06[2]; 2 G. GILMORE, *supra* note 11, § 44.94 (discussion of effect of failure to comply with the statutory requirements on secured party's right to a deficiency judgment).

29. In reality it seems unlikely that the debtor who has defaulted on the loan will be in a position to redeem the collateral, which requires that he or she tender an amount sufficient to fulfill the debt secured by the collateral and any expenses the secured party has incurred, U.C.C. § 9-506, or to bid at a public sale. Minetz, *May a "Wrongdoer" Recover a Deficiency Judgment, or Is Section 9-507(1) a Debtor's Exclusive Remedy?*, 6 U.C.C. L.J. 344, 362 (1974). See generally Davenport, *Default, Enforcement and Remedies Under the Revised Article 9 of the Uniform Commercial Code*, 7 VAL. U.L. REV. 265, 298 (1973) (discussing rationales for the no-deficiency rule).

30. See Minetz, *supra* note 29, at 348.

31. See White, *supra* note 18, at 817-18.

32. *Id.*

33. In jurisdictions that adopted the Uniform Conditional Sales Act ("UCSA"), a precursor to the UCC, compliance with the notice of resale provision of the UCSA was held by many courts to be a condition precedent to recovery of a deficiency judgment. See, e.g., *Frantz Equip. Co. v. Anderson*, 37 N.J. 420, 431, 181 A.2d 499, 505, (1962). Compare *Leasco Data Processing Equip. Corp. v. Atlas Shirt Co.*, 66 Misc. 2d 1089, 1090-91, 323 N.Y.S.2d 13, 16, (1971) (UCC did not specifically overrule the interpretation of the UCSA that barred deficiencies to noncomplying creditors so same result should follow from the UCC), with *Conti Causeway Ford v. Jarossy*, 114 N.J. Super. 382, 385, 276 A.2d 402, 404 (1971) (the UCC sale provisions are essentially different from those in the UCSA, so a different result should follow). See generally 2 G. GILMORE, *supra* note 11, § 44.94.

The court in *Atlas Thrift Co. v. Horan*, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972), incorporated the pre-UCC common law of California into its interpretation of article 9 and concluded that compliance with the notice and sale provisions is an absolute prerequisite to recovery of a deficiency judgment. See, e.g., *Camden Nat'l Bank v. St. Clair*, 309 A.2d 329, 332 (Me. 1973).

cluded that the same result should be reached in jurisdictions that have adopted the UCC.³⁴

Section 9-507(1) as the Debtor's Exclusive Remedy

A second group of courts rejects this automatic denial of a deficiency judgment to the noncomplying secured party. Instead, the debtor's remedies are limited to those provided in section 9-507(1): an affirmative suit against the secured party for damages, or setoff or counterclaim in the secured party's suit for a deficiency judgment.³⁵ As opposed to those jurisdictions adopting the no-deficiency rule, these courts prefer the UCC's explicit remedy provision over judicial legislation of additional debtor defenses.³⁶ The section 9-507(1)³⁷ remedies allow the court to "reach the merits of each case"³⁸ and, therefore, to measure damages by the harm caused by the noncompliance. Punitive remedies are avoided,³⁹ and the debtor is recompensed only for such damage as he or she has actually suffered.⁴⁰

Creation of a Rebuttable Presumption Favoring the Debtor

Finally, a third group of courts takes the position that the secured party who breaches the personal notice or commercial reasonableness provisions is not absolutely barred from a deficiency judgment. The secured party, however, must rebut a presumption that the collateral was worth the amount of the debt by evidence other than the price received at the resale.⁴¹ The secured party bears the burden of proving

34. See, e.g., *Atlas Thrift Co. v. Horan*, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972); *Leasco Data Processing Equip. Corp. v. Atlas Shirt Co.*, 66 Misc. 2d 1089, 323 N.Y.S.2d 13 (1971).

35. *Barbour v. United States*, 562 F.2d 19 (10th Cir. 1977); *Valley Mining Corp. v. Metro Bank*, 383 So. 2d 158 (Ala. 1980); *Chapman v. Field*, 124 Ariz. 100, 602 P.2d 481 (1979); *Hall v. Owen County State Bank*, 175 Ind. App. 150, 370 N.E.2d 918 (1977); *Walker v. V.M. Box Motor Co.*, 325 So. 2d 905 (Miss. 1976); *Conti Causeway Ford v. Jarossy*, 114 N.J. Super. 382, 276 A.2d 402 (1971); *Beneficial Fin. Co. v. Young*, 612 P.2d 1357 (Okla. 1980); *Grant County Tractor Co. v. Nuss*, 6 Wash. App. 866, 496 P.2d 966 (1972).

36. See, e.g., *Beneficial Fin. Co. v. Young*, 612 P.2d at 1359; *Hall v. Owen County State Bank*, 172 Ind. App. at 160-61, 370 N.E.2d at 927; *P. COOGAN, W. HOGAN & D. VAGTS*, *supra* note 26, § 8.06[2].

37. For text of § 9-507(1), see *supra* note 21.

38. *Hall v. Owen County State Bank*, 175 Ind. App. at 160, 370 N.E.2d at 927.

39. See *First Ala. Bank of Montgomery v. Parsons*, 390 So. 2d 640, 643 (Ala. App. 1980); *Hall v. Owen County State Bank*, 175 Ind. App. at 160, 370 N.E.2d at 927; *Cornett v. White Motor Corp.*, 190 Neb. 496, 501, 209 N.W.2d 341, 344 (1973); *Beneficial Fin. Co. v. Young*, 612 P.2d at 1359. See *infra* text accompanying notes 128-31.

40. *Grant County Tractor v. Nuss*, 6 Wash. App. 866, 496 P.2d 966 (1972).

41. *United States v. Willis*, 593 F.2d 247 (6th Cir. 1979); *United States v. Conrad Publishing Co.*, 589 F.2d 949 (8th Cir. 1978); *United States v. Whitehouse Plastics*, 501 F.2d 692 (5th Cir. 1974), *cert. denied sub nom. Baker v. United States*, 421 U.S. 912 (1975); *In re Bishop*, 482 F.2d 381 (4th Cir. 1973); *Leasing Assoc. v. Slaughter & Son, Inc.*, 450 F.2d 174

that a deficiency would have resulted from a sale complying with the statutory provisions. If the secured party is successful, he or she is awarded a deficiency judgment, offset by any damages the debtor may be entitled to under section 9-507(1).⁴²

The California No-Deficiency Rule

The California Supreme Court has not yet addressed the question of which remedies are appropriate when a secured party violates the personal notice or commercial reasonableness requirement. The 1972 appellate decision of *Atlas Thrift Company v. Horan*,⁴³ however, held that compliance with these provisions is an absolute prerequisite to recovery of a deficiency judgment, a ruling now accepted as authority on this issue by lower California courts.⁴⁴

The dispute in *Atlas Thrift* arose over a typical commercial credit transaction. Defendant Horan's son-in-law needed a \$10,000 loan to buy equipment to open a delicatessen. On the strength of Horan's representation that he was a silent partner in the venture, Atlas, a commercial lender, agreed to make the loan.⁴⁵ Shortly thereafter, the son-in-law defaulted and filed for bankruptcy. Plaintiff repossessed the equip-

(8th Cir. 1971); *Weaver v. O'Meara Motor Co.*, 248 Ark. 665, 453 S.W.2d 37 (1970); *Community Management Assoc. of Colorado Springs v. Tousley*, 505 P.2d 1314 (Colo. App. 1973); *State Bank of Burleigh County Trust Co. v. All-American Sub, Inc.*, 289 N.W.2d 772 (N.D. 1980).

42. For an example of application of the rule, see *infra* note 56 & accompanying text.

43. 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972).

44. See *Western Decor & Furnishings Indus. v. Bank of America*, 91 Cal. App. 3d 293, 154 Cal. Rptr. 287 (1979); *Clark Equip. Co. v. Mastelotto, Inc.*, 87 Cal. App. 3d 88, 150 Cal. Rptr. 797 (1978); *General Elec. Credit Corp. v. Bo-Mar Constr. Co.*, 72 Cal. App. 3d 887, 140 Cal. Rptr. 417 (1977); *J.T. Jenkins Co. v. Kennedy*, 45 Cal. App. 3d 474, 119 Cal. Rptr. 578 (1975); *Barber v. LeRoy*, 40 Cal. App. 3d 336, 115 Cal. Rptr. 272 (1974).

One decision expanded the no-deficiency rule of *Atlas Thrift* to impose upon the secured party the burden of pleading and proving compliance with the notice and commercial reasonableness requirements in a suit for a deficiency judgment. *Barber v. LeRoy*, 40 Cal. App. 3d at 343, 115 Cal. Rptr. at 277.

45. The president of Atlas was acquainted with Horan and with his credit rating. Horan refused, however, to sign the financing agreement, claiming that his lease for his own delicatessen business prohibited him from engaging in a similar enterprise within 25 miles of his current location. After the son-in-law entered bankruptcy and Atlas turned to Horan to make good on the loan, Horan denied that he was a silent partner in the business. The trial court in its findings of fact, which were not challenged on appeal, found that Horan had orally represented himself as a silent partner in the venture. On appeal the parties conceded that Horan was a "debtor" within the meaning of California Commercial Code § 9105(1)(d) (U.C.C. § 9-105(1)(d)) and was entitled to notice of the sale of the collateral. *Atlas Thrift*, 27 Cal. App. 3d at 1001-02, 104 Cal. Rptr. at 315-16.

California adopted the UCC as its Commercial Code and renumbered the sections to conform to the numbering of the California Codes, dropping the hyphens found in the UCC version. For example, U.C.C. § 9-504 appears as CAL. COM. CODE § 9504. The text of this Comment adheres to the UCC numbering system for consistency.

ment and, without giving Horan the required personal notice, sold it at a "public 'sale' in its own office."⁴⁶ Actually, Atlas itself purchased the collateral for \$2,000. The trial court later found the collateral to have had a fair market value of \$12,500 at the time of the sale.⁴⁷

Atlas argued to the court that failure to give notice or to conduct a commercially reasonable sale did not as a matter of law deprive the secured party of the right to a deficiency judgment.⁴⁸ The plaintiff further asserted that, because the section 9-507(1) damages provision furnished "an adequate and exclusive remedy," the debtor was "precluded by law from raising a failure to comply with section 9504, subdivision (3), as a defense to a deficiency action"⁴⁹ The conclusion Atlas urged upon the court was that section 9-507(1) gave the debtor an exclusive remedy for damages caused by the secured party's failure to comply with the notice and commercial reasonableness requirements.⁵⁰

Horan countered that the secured party's failure to comply with section 9-504(3) gave the debtor a complete defense to a deficiency judgment action as a matter of law.⁵¹ He based this conclusion on cases holding that personal notice is mandatory and a "condition precedent to the secured party's recovery of a deficiency judgment."⁵² Notice especially was considered essential because without it the debtor was denied the right of redemption.⁵³ The key to Horan's argument was his assertion that section 9-507 was "intended only to provide an affirmative cause of action to recover for a loss that has already been sustained." From this narrow reading of section 9-507, Horan contended that the secured party's noncompliance provided the debtor a complete defense to a deficiency judgment action.⁵⁴

The trial court agreed with Atlas' argument, taking the view that "the spirit of commercial reasonableness requires that the secured party not be arbitrarily deprived of his deficiency"⁵⁵ Applying the rule that the noncomplying secured party must rebut a presumption that the market value of the collateral equalled the amount of the debt, and finding that the collateral was worth \$12,500, the trial court levied a

46. *Atlas Thrift*, 27 Cal. App. 3d at 1001, 104 Cal. Rptr. at 316.

47. *Id.* at 1002 n.1, 104 Cal. Rptr. at 316 n.1.

48. *Id.* at 1003, 104 Cal. Rptr. at 317.

49. *Id.*

50. *Id.*

51. *Id.* at 1002, 104 Cal. Rptr. at 316.

52. *Id.* at 1007, 104 Cal. Rptr. at 320 (citations omitted).

53. *Id.*

54. *Id.* Horan was seeking, therefore, full relief from the debt, not damages to compensate for any loss Atlas' conduct might have caused him.

55. *Id.* at 1006-07, 104 Cal. Rptr. at 319-20 (quoting *Conti Causeway Ford v. Jarossy*, 114 N.J. Super. 382, 386, 276 A.2d 402, 404 (1971)).

\$2,000 judgment against Horan.⁵⁶ The appellate court, recognizing that the availability of a deficiency judgment under these circumstances was a question of first impression in California,⁵⁷ reversed the trial court and denied the deficiency judgment.

After reviewing the various positions taken on this issue in other jurisdictions, the appellate court accepted Horan's argument on three grounds. First, the court reasoned that section 9-507 was not an exclusive remedy because the UCC did not expressly state that it was exclusive. The *Atlas Thrift* court relied on section 1-103 of the UCC, which authorizes the incorporation of "pre-Code" remedies,⁵⁸ to justify its application of the California common law to the case. Second, the court concluded that section 9-507(1) is phrased as an "affirmative remedy" for the debtor and thus cannot be used by the debtor as a defense to a deficiency judgment.⁵⁹ Finally, the court suggested, without explanation, that public policy and "the ends of justice" support the no-deficiency rule.⁶⁰ When the reasoning underlying each of these conclusions is examined, however, serious flaws appear.

Incorporation of Pre-UCC Remedies

The UCC provides for the incorporation of pre-UCC law only where the UCC has not "displaced preexisting . . . principles of law and equity."⁶¹ The *Atlas Thrift* court did not consider whether section

56. *Id.* The trial court made the following calculation in arriving at its finding of a \$2,000 deficiency owed by Horan:

Amount due on default	\$15,000
Less: Payments made (\$500) plus fair market value of the collateral (\$12,500)	\$13,000

Deficiency Owed	\$ 2,000
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At trial, apparently neither *Atlas* nor Horan offered appraisal evidence as to the value of the collateral. The trial court, therefore, looked to the Security Agreement and found the value listed there to be \$12,500. It appears that no evidence was offered of any diminution in value of the equipment because of use in the defendant's business. *Id.* at 1006 n.5, 104 Cal. Rptr. at 319 n.5.

57. *Id.* at 1003, 104 Cal. Rptr. at 317. The court noted that it was faced with nothing approaching the uniformity of "laws among the various jurisdictions" that the drafters of the UCC hoped to foster. U.C.C. § 1-102(2)(c) (1978).

58. 27 Cal. App. 3d at 1007, 104 Cal. Rptr. at 320-21. See *infra* text accompanying notes 61-85.

59. 27 Cal. App. 3d at 1008-09, 104 Cal. Rptr. at 321. See *infra* text accompanying notes 94-101.

60. 27 Cal. App. 3d at 1008, 104 Cal. Rptr. at 321. See *infra* text accompanying notes 105-20.

61. U.C.C. § 1-103 provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."

9-507 had displaced California common law, but instead summarily concluded that, because section 9-507 does not claim exclusivity in the field of remedies and does not mention deficiency judgments, the section allows a court to supplement its rule with common law principles.⁶² In determining whether recourse to pre-UCC law through section 1-103 was available in a given circumstance, however, courts in states other than California have considered whether the UCC "displaces" the former law, rather than whether language in the statute expressly states that a particular section occupies the field.⁶³ The Supreme Court of Alaska,⁶⁴ for example, ruled that a trial court, using section 1-103 to move from the UCC system to the common law, erred in applying "general contract principles" to a sale of goods contract:

Where both the code and general principles are available, the former should always be considered and applied if applicable. By legislative declaration the code is the law, and if general principles appear inconsistent, they must be considered displaced

Specific code provisions were available to deal with the present case; they should have been applied.⁶⁵

Had the court applied this reasoning to the remedies issue in *Atlas Thrift*, it would have reached a different result in that case. Section 9-504(2) of the UCC gives the secured party the right to a deficiency judgment.⁶⁶ Section 9-507 establishes the liability of the secured party for breach of the debtor's rights to personal notice and to a reasonable sale.⁶⁷ By precluding the secured party's right to a deficiency judg-

62. The *Atlas Thrift* court's discussion of the appropriateness of using pre-UCC law was brief: "Since section 9507 is not expressly made an exclusive remedy, and does not specifically purport to have any bearing on deficiency judgments, it is of significance to recall that under California law a mortgagee who disposed of mortgaged property after default, without following the notice requirements . . . was barred from recovering a deficiency judgment." 27 Cal. App. 3d at 1008, 104 Cal. Rptr. at 321 (citations omitted) (emphasis added). The court does not explain why the failure of § 9-507 to claim exclusivity leads to the conclusion that it is not exclusive, nor why the failure of this damages provision to "deal with" deficiency judgments implies that damages and the bar-to-deficiency rule are cumulative remedies where the creditor has not complied with § 9-504(3). See also *In re Bishop*, 482 F.2d 381, 385 n.3 (4th Cir. 1973) (pre-UCC Virginia law held that the noncomplying creditor was barred from receiving a deficiency judgment; therefore, the bankruptcy court was not wrong as a matter of law to apply that rule to a case governed by the UCC); *Camden Nat'l Bank v. St. Clair*, 309 A.2d 329 (Me. 1973) (using § 1-103 to adopt the pre-UCC law of Maine barring deficiency judgments to noncomplying creditors as the rule under the UCC).

63. See generally *Toomey Equip. Co. v. Commercial Credit Equip. Corp.*, 386 So.2d 1155, 1159 (Ala. Civ. App. 1980) (where particular "provisions [of the UCC] do displace prior law, the code prevails"); *Philadelphia Bond & Mortgage Co. v. Highland Crest Homes, Inc.*, 235 Pa. Super. 252, 261, 340 A.2d 476, 481 (1975) (a common law doctrine can "only stand to the extent that it is not inconsistent with the Code").

64. *Prince v. LeVan*, 486 P.2d 959 (Alaska 1971).

65. *Id.* at 962.

66. See *supra* note 6.

67. See *supra* note 21.

ment, the common law is inconsistent with these UCC provisions. The conclusion more consistent with case law interpreting section 1-103, therefore, is that the section 9-507 remedies for breach of the secured party's duties following default under part 5 displace the common law on the subject.⁶⁸

The *Atlas Thrift* court, however, based its use of section 1-103 on the absence of language expressly overruling the common law. In taking this approach, the court may have been relying on a general rule of statutory interpretation: a statute is presumed to state the common law absent express indications to the contrary;⁶⁹ the common law is displaced, however, where it has been modified by statute.⁷⁰ The intent to supplant the common law by statute may be found in the statute itself, in its legislative history, or in the comments of the drafters or code commissioners.⁷¹ While section 9-507(1) does not explicitly claim to occupy the field of debtor remedies in secured transactions, the official comment to that section and the comments introducing article 9 indicate the intent that the statute occupy the field.⁷²

The intended relationship of the UCC provision for damages to the common law is evident from the underlying goal of the UCC: "to make uniform the law among the various jurisdictions."⁷³ By reverting to pre-UCC law, the *Atlas Thrift* court helped to frustrate this policy by revitalizing a rule peculiar to California,⁷⁴ making possible a result that

68. In considering the effect of a failure to give notice on a creditor's right to a deficiency, "[a] few courts have held that in the absence of a specific provision of the Uniform Commercial Code addressing this problem, they would allow the precedents established under pre-Code statutes. . . . [E]valuating the problem anew in the context of the new Act is more desirable. . . . When the Code fails to answer a particular question directly, there is no need to completely disregard prior law [citing § 1-103], but the primary source of learning should be the Code itself. A court's goal should be to interpret the Act in a way that will further its underlying purposes and policies." *Rushton v. Shea*, 423 F. Supp. 468, 471 (D. Del. 1976) (citations omitted).

69. See, e.g., *Saala v. McFarland*, 63 Cal. 2d 124, 130, 403 P.2d 400, 404, 45 Cal. Rptr. 144, 148 (1965); *Gray v. Sutherland*, 124 Cal. App. 2d 280, 290, 268 P.2d 754, 761 (1954).

70. See, e.g., *Estate of Elizalde*, 182 Cal. 427, 432-33, 188 P. 560, 562 (1920); *Monterey Club v. Superior Court*, 48 Cal. App. 2d 131, 145, 119 P.2d 349, 356 (1941); CAL. CIV. CODE § 4 (West 1954) ("The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with the view to effect its objects and to promote justice.").

71. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 817 n.10, 532 P.2d 1226, 1235 n.10, 119 Cal. Rptr. 858, 867 n.10 (1975); *Baranov v. Scudder*, 177 Cal. 458, 464-65, 170 P. 1122, 1124 (1918); *O'Hara v. Wattson*, 172 Cal. 525, 534-35, 157 P. 608, 610 (1916). See generally 58 CAL. JUR. 3D *Statutes* § 5 (1980) (discussing the effect of statutes on the common law in California).

72. See *infra* notes 75-83 & accompanying text.

73. U.C.C. § 1-102(2)(c) (1978).

74. See *infra* text accompanying notes 84-93.

other jurisdictions, using the same reasoning, would not necessarily reach.

The more specific relationship of article 9 to the common law is suggested in the official comment to section 9-101, which explains that the article establishes "a comprehensive scheme for the regulation" of secured transactions.⁷⁵ The comment proceeds with an overview of pre-UCC security law and states that, in the face of complex and inconsistent common law governing secured financing devices, the article aims "to provide a simple and *unified* structure within which . . . secured financing transactions can go forward with less cost and greater certainty."⁷⁶ From this statement, it appears that the drafters intended article 9 to replace, not supplement, existing law.

The intended scope of the section 9-507 remedies provision can also be discerned by reading the section as the UCC instructs: "Section captions are parts of this Act [and] not mere surplusage."⁷⁷ Section 9-507 is captioned "Secured Party's Liability for Failure to Comply With This Part." Subsection 1 then lists the liabilities that the secured party might incur if he or she fails to meet the notice or sale requirements.⁷⁸ The scope of these remedies, therefore, should be determined by reading them together with the section caption. When so read, it is evident that the section provides a comprehensive listing of the "Secured Party's Liability" for noncompliance with part 5 of article 9, not merely one of a number of remedies available to the debtor.⁷⁹

The effect of section 9-507 on the common law can best be discerned from the drafters' intent in formulating it. The section's purpose is to enforce the limitations on the secured party's right to dispose of the collateral by giving the debtor remedies for the secured party's breach of duties of good faith, personal notice, and commercial reasonableness.⁸⁰ The drafters explain in the official comment to the section

75. U.C.C. § 9-101 official comment (1978).

76. *Id.* (emphasis added).

77. *Id.* § 1-109 (1978). In keeping with its statutory scheme, which deems section captions to have no effect on the "scope, meaning or intent of the provisions of a section," California did not enact § 1-109. CAL. COM. CODE § 1109, California code comment (West 1964). This departure from the UCC version is irrelevant here, however, because the intent of the UCC drafters, and not that of the California legislature, is at issue.

78. *See supra* note 21.

79. A similar conclusion was reached in *United States v. Whitehouse Plastics*, 501 F.2d 692, 696 (5th Cir. 1974), *cert. denied sub nom. Baker v. United States*, 421 U.S. 912 (1975): "In view of this specific statutory remedy [§ 9-507(1)] we doubt that . . . failure to give notice would bar the creditor's right to a deficiency judgment. . . . This conclusion is strengthened by the discussion in *Norton v. Nat'l Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538, 539-40 (1966), which indicates that amicus briefs filed in that case for the Permanent Editorial Board of the UCC concluded that improper disposition by the secured party made the secured party liable for damages suffered as a result." *See* 1A P. COOGAN, W. HOGAN & D. VAGTS, *supra* note 26, § 8.06[1].

80. U.C.C. § 9-507 official comment 1 (1978).

that "[i]n the case where [the creditor] proceeds, or is about to proceed in a contrary manner, it is vital both to the debtor and other creditors to provide a remedy for failure to comply with the statutory duty."⁸¹ The comment then restates the remedies provided: judicial restraint of non-complying sales and damages where the disposition has already occurred.⁸² This statement implies that the section provides a comprehensive plan for enforcing a policy of commercial reasonableness in the sale of the debtor's collateral, in that specific remedies are provided to the debtor in the event of the secured party's breach.⁸³ The absence of an explicit rejection of the common law notwithstanding, the comments to article 9 and to section 9-507, as well as the UCC's goal of providing a uniform law, persuasively suggest that these remedies are exclusive. Judicial resort to pre-UCC law is, therefore, impermissible.

Assuming, however, that section 9-507 is not exclusive and could be supplemented by pre-UCC law, the court's determination in *Atlas Thrift* of what constitutes appropriate pre-UCC law concerning the availability of a deficiency judgment must be questioned. The court analogized defaults in UCC secured transactions to defaults on chattel mortgages under pre-UCC California law,⁸⁴ and relied on *Metheny v. Davis*,⁸⁵ the authoritative case on deficiency judgments under that system. The *Metheny* court ruled that a creditor who did not give notice of the sale of the debtor's collateral forfeited the right to a deficiency judgment.⁸⁶

In *Metheny*, a promissory note was secured by a chattel mortgage on household furniture. Upon default on the note, the mortgagee took possession of the furniture and sold it without first giving notice to the mortgagor as required by statute and by the terms of the mortgage agreement.⁸⁷ The court denied the mortgagee his deficiency judgment because in California a chattel mortgage created only a lien on property.⁸⁸ The mortgagee's improper disposition of the collateral, therefore, amounted to a conversion destroying the lien and, consequently, any further rights that the mortgagee might assert against the mortga-

81. *Id.*

82. *Id.*

83. A Washington state appellate court considering remedies for a secured party's failure to give notice of resale of the debtor's collateral concluded, "In view of this remedy [§ 9-507(1) damages], we are of the opinion the writers of the Uniform Commercial Code did not intend that the creditor's [noncompliance] . . . would result in a forfeiture of the creditor's right to a deficiency." *Grant County Tractor Co. v. Nuss*, 6 Wash. App. 866, 870, 496 P.2d 966, 969 (1972); see also *Hogan, Pitfalls in Default Procedure*, 2 U.C.C. L.J. 244, 257 (1970).

84. *Atlas Thrift*, 27 Cal. App. 3d at 1008, 104 Cal. Rptr. at 321.

85. 107 Cal. App. 137, 290 P. 91 (1930).

86. *Id.* at 142, 290 P. at 92-93.

87. *Id.* at 138, 290 P. at 91.

88. *Id.* at 139, 290 P. at 91.

gor.⁸⁹ The *Metheny* court pointed out that this result would not follow in jurisdictions where a chattel mortgage invested the mortgagee with legal title instead of a lien; in such jurisdictions, "the only relief the mortgagor is entitled to is to have credited upon his note the fair value of the mortgaged property."⁹⁰

Metheny, however, is inapposite to the secured transaction remedies problem in *Atlas Thrift*. Section 1-103 allows incorporation of pre-UCC law only where it has not been displaced by the UCC.⁹¹ The crucial distinction made in *Metheny* between title and lien theories of security devices is one that the UCC explicitly rejects: "Each provision of . . . Article [9] with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor."⁹² Further, in an official comment the drafters reiterate that "rights, obligations and remedies under the Article do not depend on the location of title."⁹³ The *Metheny* court adopted the no-deficiency rule because California at that time followed a lien theory of chattel mortgages. Because this theory is no longer valid under the UCC, *Metheny* does not supply a valid precedent for the holding of *Atlas Thrift*.

The court's reliance on pre-UCC law as one basis for adopting the no-deficiency rule is misplaced. Resort to pre-UCC law is not, in this situation, authorized by section 1-103, nor is the California chattel mortgage no-deficiency rule sufficiently analogous to the UCC secured transaction to be of precedential value. However, the *Atlas Thrift* court based its holding on two additional grounds that must also be examined: procedure and policy.

Procedural Limitations of the Section 9-507 Remedies

The second basis of the *Atlas Thrift* decision focuses on the procedural implications of the language of section 9-507, which states that the debtor "has a *right* to recover from the secured party any loss

89. *Id.* at 142, 290 P. at 91-92. See CAL. CIV. CODE § 2910 (West 1974); see also L. JONES, A TREATISE ON THE LAW OF MORTGAGES ON PERSONAL PROPERTY § 711 (5th ed. 1980): To get a deficiency judgment the mortgagee must "foreclose his mortgage in equity, or in a manner provided by statute. By selling in any other mode he waives all claim for a deficiency." (Footnote omitted.)

90. 107 Cal. App. at 139, 290 P. at 91.

91. See *supra* text accompanying notes 75-78.

92. U.C.C. § 9-202 (1978).

93. *Id.* § 9-101 official comment. The California Senate Fact Finding Committee on Judiciary recognized the impact of § 9-202 on California security law: "This section would change rather drastically the law of California, since the existing law makes the location of title all-important in both defining the various [security] devices and in determining substantive rights [under them]." CALIFORNIA LEGISLATURE, SENATE FACT FINDING COMMITTEE ON JUDICIARY, SIXTH PROGRESS REPORT TO THE LEGISLATURE, PART 1, THE UNIFORM COMMERCIAL CODE 125 (1959-1961), reprinted in CAL. COM. CODE § 9202 (West 1964).

caused by a failure to comply with the provisions of this Part.”⁹⁴ The defendant, Horan, made what on first impression seems a self-defeating argument, contending that section 9-507 merely limits a debtor’s remedies to an affirmative cause of action against a secured party who breaches the notice and commercial reasonableness requirements, rather than providing a complete defense to a deficiency action.⁹⁵

The strategy behind Horan’s argument is actually quite simple. The damages remedy of section 9-507(1) would have provided him at best with a setoff to the deficiency judgment Atlas was seeking. If the court found, as Horan argued, that compliance with the notice and sale requirements was a condition precedent to recovery of any deficiency judgment by the secured party, however, Horan could escape all remaining liability of the debt.

To evaluate Horan’s argument, the court interpreted the language of section 9-507(1) concerning the debtor’s “right to recover.” Adopting the reasoning of a New York court,⁹⁶ the *Atlas Thrift* court concluded that “[t]he words used [by the statute] plainly contemplate an affirmative action to recover for a loss that has already been sustained”⁹⁷ The New York court decided, and the *Atlas Thrift* court agreed, that the wording of the section indicated that it was “unlikely” that the UCC drafters intended the section to afford a debtor a defense to a deficiency judgment action.⁹⁸ The New York and California courts then concluded that, because the statute provided, in their judgments, only affirmative relief, the courts should develop an absolute defense to the secured party’s deficiency judgment suit.⁹⁹

Reading section 9-507(1) narrowly to provide the debtor only affirmative relief strains the language of the statute. The section provides the debtor with certain “rights” against the creditor.¹⁰⁰ How those rights are to be enforced procedurally is not limited to an affirmative action, as the *Atlas Thrift* court believed. The UCC, establishing a policy of liberal administration of its remedies, states that “[a]ny right . . . declared by this Act is enforceable by action,”¹⁰¹ with “action” defined as a “judicial proceeding includ[ing] recoupment, counterclaim, set-off

94. U.C.C. § 9-507(1) (1978).

95. *Atlas Thrift*, 27 Cal. App. 3d at 1007, 104 Cal. Rptr. at 320.

96. *Leasco Data Processing Equip. Corp. v. Atlas Shirt Co.*, 66 Misc. 2d 1089, 323 N.Y.S.2d 13 (N.Y. Civ. Ct. 1971).

97. *Atlas Thrift*, 27 Cal. App. 3d at 1008-09, 104 Cal. Rptr. at 321 (quoting *Leasco Data Processing*, 66 Misc. 2d at 1091, 323 N.Y.S.2d at 16).

98. *Id.* at 1009, 104 Cal. Rptr. at 321.

99. *Id.*

100. “[T]he debtor . . . has a right to recover from the secured party any loss caused by a failure [of the secured party] to comply with the provisions of this Part.” U.C.C. § 9-507(1) (1978) (emphasis added).

101. *Id.* § 1-106(2).

. . . ."¹⁰² By granting the debtor a "right," the plain language of section 9-507(1) envisions not only an affirmative action, but any of a number of procedural means of enforcing the debtor's claim to any damages he or she can prove. The *Atlas Thrift* court did not take into account the crucial definitions article 1 provides for interpreting the UCC¹⁰³ and, therefore, misread the section.

If the reasoning of *Atlas Thrift* is followed to its logical conclusion, the secured party, besides being barred by the judge-made no-deficiency rule from recovering a personal judgment against the debtor, would also be liable in damages to the debtor under section 9-507(1).¹⁰⁴ This result is disproportionate to any wrong committed by the secured party or suffered by the debtor. It is, as well, a result contrary to UCC policy as explained in the next section of this Comment.

Policy and the No-Deficiency Rule

The final basis for the *Atlas Thrift* decision is grounded very generally in policy; the court concluded "that the better reasoning and the ends of justice require the acceptance of" the no-deficiency rule.¹⁰⁵ It can be argued, however, that the greatest flaw in this rule appears when it is viewed in light of UCC policy.

The UCC establishes a compensatory scheme for damage awards; it mandates awards that will put the injured party "in as good a position as if the other party had fully performed . . ."¹⁰⁶ Further, "neither consequential or special nor penal damages may be had *except as specifically provided in this Act*. . . ."¹⁰⁷ This limitation on the availability

102. *Id.* § 1-201(1).

103. One commentator offered this explanation of the relation of article 1 to the UCC: "Article 1 . . . is not intended to be a separate division of commercial law. In fact, the provisions of that Article established the basic framework of the entire Uniform Commercial Code." Clontz, *Guide to a Secured Creditor's Remedies on Debtors' Default*, 7 U.C.C. L.J. 348, 348 (1975).

104. The Supreme Court of Utah, for example, denied the secured party a deficiency judgment because the sale of the collateral was made without notice and in a commercially unreasonable manner. The court also awarded the debtor damages pursuant to § 9-507(1) (UTAH CODE ANN. § 70A-9-507 (1953) (amended 1963)). *Chrysler Credit Corp. v. Burns*, 562 P.2d 233, 234 (Utah 1977). A California appellate court has also suggested that the debtor, in addition to escaping personal liability, may be entitled to damages. *J.T. Jenkins Co. v. Kennedy*, 45 Cal. App. 3d 474, 484, 119 Cal. Rptr. 578, 585 (1975).

105. *Atlas Thrift*, 27 Cal. App. 3d at 1008, 104 Cal. Rptr. at 321.

106. U.C.C. § 1-106(1) (1978).

107. *Id.* (emphasis added). Official comment 1 to this section adds that "compensatory damages are limited to compensation. They do not include consequential or special damages, or penal damages; and the Act elsewhere makes it clear that damages must be minimized" (citation omitted).

In some instances courts have awarded the debtor punitive damages, reasoning that a resale that does not comply with the notice and commercial reasonableness provisions is a conversion by the secured party of the debtor's property. Section 1-106(1) allows punitive

of punitive damages is intended to better reflect the commercial realities of the marketplace. Parties are presumed to act in good faith,¹⁰⁸ and compensation, not penalties, for injury satisfies UCC policy.¹⁰⁹

In order to effectuate this compensatory policy, the judiciary must recognize that on facts such as those encountered in *Atlas Thrift* there are two injured parties. The debtor has injured the secured party by breaching his or her obligation to pay the debt; the secured party has potentially injured the debtor by not complying with the sale or notice requirements.¹¹⁰ An appropriate remedy, then, must compensate both without unduly penalizing either.

The appropriate remedy for breach of the secured party's section 9-504(3) duties must reflect the policy underlying those duties. The commercial reasonableness and notice of sale requirements work to protect the defaulting debtor by ensuring that a fair price is recovered from the sale of his or her collateral.¹¹¹ Given these limitations on the secured party's behavior, is the debtor in need of more protection than the damages provision provides? The answer to this question depends in part on whether the debtor is a reasonably sophisticated commercial borrower or a consumer.

damages where explicitly provided by the UCC or by other rule of law. By analogizing to the tort of conversion, therefore, an award of punitive damages is approved where the debtor shows that the creditor acted with fraud, malice, or oppression. See *Beneficial Fin. Co. v. Young*, 612 P.2d 1357, 1359 (Okla. 1980); *Davidson v. First Bank & Trust Co.*, 559 P.2d 1228, 1232 (Okla.), *modified*, 609 P.2d 1259 (1977).

108. See *Hall v. Owen County State Bank*, 175 Ind. App. 150, 162, 370 N.E.2d 918, 928 (1977). See generally 2 A. SQUILLANTE & J. FONSECA, *THE LAW OF MODERN COMMERCIAL PRACTICES* 859 (1981) (because "[m]ost commercial transactions are performed in good faith," a flexible remedy allowing the creditor to recover a deficiency judgment but making him or her liable to the debtor for any damages caused by noncompliance with the UCC is to be preferred).

109. The UCC limits the secured party's disposition of the collateral to what is "commercially reasonable." § 9-504(3). If the sale does not meet this standard, a remedy is needed. If the creditor compensates the debtor in damages for the harm caused by a sale conducted without notice or in an unreasonable manner, a commercially reasonable sale has been approximated. This is all that the UCC and justice require. See *Fedders Corp. v. Taylor*, 473 F. Supp. 961 (D. Minn. 1979) (damages awarded debtor for harm caused by an improper sale approximated a commercially reasonable disposition); *Minetz, supra* note 29, at 363 ("[i]f the secured party has reimbursed the debtor for any losses incurred by the improper sale, he has approximated the commercially reasonable sale"); see also S. KLEINMAN, *FUNDAMENTALS OF BUSINESS LAW* § 13-24 (1973).

110. One court stated: "To hold that noncompliance deprived creditors of their right to a deficiency judgment would not only protect the debtor, but it would also penalize the creditor. In light of the fact that the sale of the collateral is necessitated by the fault of the debtor, . . ." the court rejected the no-deficiency rule. *Beneficial Fin. Co. v. Young*, 612 P.2d 1357, 1359 (Okla. 1980).

111. *White, supra* note 18, at 817-18; see 1A P. COOGAN, W. HOGAN & D. VAGTS, *supra* note 26, § 8.06[2].

In adopting article 9, the California legislature¹¹² made a significant change in its scope by limiting its application to commercial secured transactions. Consumer credit sales are governed by the Retail Installment Sales Act, which affords significant protections to the consumer.¹¹³ For example, the Sales Act bars the creditor from recovering a deficiency judgment under any circumstances.¹¹⁴

The California decision to treat consumers in separate legislation¹¹⁵ finds support in article 9 itself, which provides that statutes covering the field of consumer finance prevail over the UCC where the two bodies of law might conflict.¹¹⁶ The limitation of the scope of California's version of article 9 to commercial transactions recognizes that the consumer in installment sales and loan transactions requires different treatment and protection than does the commercial debtor.¹¹⁷ Stricter protections for the commercial debtor, one California appellate court declared, have not been "deemed to be necessary where equally compe-

112. Article 9 was enacted into law in California in 1963.

113. "A transaction, although subject to this division, is also subject to the Retail Installment Sales Act, Title 2 (commencing with section 1801) of Part 4, Division 3 of the Civil Code . . . and in the case of conflict between the provisions of this division and [the Retail Installment Sales Act], the provisions of [the Retail Installment Sales Act] control." CAL. COM. CODE § 9203(4) (West 1964 & Supp. 1982).

114. CAL. CIV. CODE § 1812.5 provides: "If the proceeds of the sale [of debtor's collateral] are not sufficient to cover [expenses of the sale, expenses of retaking, including reasonable attorney's fees, and expenses of keeping, storing or repairing the collateral for resale, and satisfaction of the balance due under the contract], the holder may not recover the deficiency from the [debtor] or from anyone who has succeeded to the obligations of the [debtor]."

115. The California Retail Installment Sales Act, or Unruh Act, is consumer protection legislation covering sales of goods and furnishing of services on an installment basis. The Act applies where the buyers who obtain the goods or services do so without the principal purpose of resale. CAL. CIV. CODE §§ 1802.1-1802.5 (West 1973 & Supp. 1982).

In adopting article 9 of the UCC, the California legislature deleted most operative references to consumer sales. For example, the UCC notice provision of § 9-504(3) requires that reasonable notice of the resale be sent the debtor, but where the collateral is consumer goods, no additional notice to other secured parties need be sent. That requirement was deleted from the California version. In the case of a consumer installment sale, § 9-504(3) will not apply at all, because CAL. COM. CODE § 9203(4) gives the Retail Installment Sales Act precedence over the UCC. Thus, the required notice is described at §§ 1812.2 and 1812.3 of the Civil Code and is substantially different from that provided in the UCC.

California has also enacted separate legislation for automobile financing transactions, the Automobile Sales Finance Act, CAL. CIV. CODE §§ 2931-2984.4.

116. U.C.C. § 9-203(4) (1978).

117. "Retail installment sales acts are designed to protect the buyer from the unequal bargaining power which normally exists between retailer and consumer. On the other hand, the policy of Part [Chapter] 5 is to provide simple, efficient remedies producing the maximum realization upon the collateral so that credit will not only be easier but cheaper to procure. While not necessarily inconsistent, these policies have different goals for which the legislature requires different sets of rules." Project, *California Chattel Security and Article Nine of the Uniform Commercial Code*, 8 UCLA L. REV. 806, 966 (1961), reprinted in CAL. COM. CODE § 9507 (West 1964) (footnotes omitted).

tent businessmen are dealing with each other in arm's length transactions."¹¹⁸ It is precisely in this situation involving a commercial debtor and creditor that the no-deficiency rule is entirely unnecessary, as these parties do not require the protection justifiably accorded to unsophisticated consumers.

Assuming that a sale without personal notice or a commercially unreasonable sale of the collateral has occurred, the commercial debtor must prove damages to recover under section 9-507.¹¹⁹ Several courts and commentators have pointed to the difficulty of furnishing such proof;¹²⁰ in fact, the debtor often may not actually be damaged. For example, suppose that upon default the debtor owes the secured party \$10,000. After repossessing the collateral, which has a fair market value of \$8,000, the secured party sells it, without notice to the debtor, and receives \$8,000 from the sale. Because the fair market value of the collateral has been realized at the sale, the debtor has suffered no actual

118. *James Talcott, Inc. v. Gee*, 266 Cal. App. 2d 384, 387, 72 Cal. Rptr. 168, 170-71 (1968) (debtor argued that his default on installment purchase of a printing press should be governed by the Retail Installment Sales Act; the court rejected this theory because the press was bought for business, not personal, use, so the transaction did not merit the special protection applicable to consumer buyers).

The UCC drafters also recognized the special needs of consumer debtors: "Consumer installment sales and loans present special problems of a nature which makes special regulation of them inappropriate in a general commercial codification. . . . While this Article applies generally to security interests in consumer goods, it is not designed to supersede such regulatory legislation." U.C.C. § 9-101 official comment (1978).

119. "[T]he debtor . . . has a right to recover from the secured party any loss caused by a failure to comply with . . . Part [5]." U.C.C. § 9-507(1) (1978) (emphasis added).

120. For example, once the collateral has been sold, the debtor will have a difficult time proving its fair market value at the time of sale. The Arkansas Supreme Court recognized this problem, which is particularly difficult to overcome when the collateral has been removed from the locality before the debtor learns of the sale. The court concluded, therefore, that "simple considerations of fair play cast the burden of proof upon [the secured party] [I]t was the [secured party's actions] that make it at least difficult, if not impossible, for [the debtor] to prove the extent of his loss. . . ." *Norton v. National Bank of Commerce*, 240 Ark. 143, 149, 398 S.W.2d 538, 542 (1966). The court then adopted the presumption that the collateral was worth the amount of the debt and gave the secured party the burden of proving the amount that should have been obtained at a reasonable sale. *Id.*

Indiana has also adopted the presumption rule in order to overcome the debtor's proof problem: "[I]n cases where the debtor was not notified of an impending sale, the creditor should be in a much better position to prove the value of the collateral at the time of the disposition." *Hall v. Owen County State Bank*, 175 Ind. App. 150, 162, 370 N.E.2d 918, 928 (1977); see *Minetz, supra* note 29, at 362. But see *Note, Remedies for Failure to Notify Debtor of Disposition of Repossessed Collateral Under the UCC*, 44 U. COLO. L. REV. 221, 227 (1972).

When the collateral is consumer goods, the minimum recovery provision of § 9-507(1) applies. This section, which does not require that the debtor actually be damaged in order to recover, solves the proof problem for the consumer debtor. See 1A P. COOGAN, W. HOGAN & D. VAGTS, *supra* note 26, at § 8.01[1].

loss and cannot recover damages under section 9-507(1).¹²¹ Of course, if the debtor could show that he or she would have redeemed the collateral, damages for loss of its use might be available.¹²² Because damages need not be calculable with mathematical accuracy,¹²³ mere difficulty in attaching a dollar value to such a loss would not be fatal to the debtor's claim.

If, on the other hand, a resale price of \$6,000 is realized in a non-complying sale for the same collateral worth \$8,000, the debtor can produce evidence of this shortfall and recover under section 9-507(1). In this case, the debtor receives compensation in the form of a \$2,000 setoff against the deficiency judgment awarded to the secured party. But where nothing has been lost, as in the first example, compensation is unnecessary and the UCC, therefore, provides no remedy.

The result reached by following the no-deficiency rule directly conflicts with the compensatory scheme of the UCC's remedy provisions. In *Atlas Thrift*, for example, even after the debtor's account was credited with the asserted market value of the equipment, \$2,000 was left owing to the secured party.¹²⁴ The denial of a deficiency judgment to Atlas resulted in a windfall to Horan in the form of an obligation avoided. The secured party's loss on the transaction amounted to a penalty for failure to give notice.

In their efforts to protect the defaulting debtor, the California courts and those in other jurisdictions adopting the no-deficiency rule have given little attention to the rights of the secured party. In a loan transaction, the secured party assumes the risk that the borrower will default;¹²⁵ the secured transaction is a strategy to reduce that risk. However, the security, especially where it is goods as opposed to chattel paper or securities, likely will decline in value during the lifetime of the loan, whether from normal wear and tear, outright damage, or destruction. To compensate for the decreasing value of the security, the UCC gives the secured party the further right to a deficiency judgment.¹²⁶ As one commentator noted, "the whole purpose of a secured transaction is to insure that the creditor will not find himself without an enforceable remedy if default in payment or performance of the underlying obliga-

121. See *Weaver v. O'Meara Motor Co.*, 452 P.2d 87, 91-92 (Alaska 1969); *Conti Causeway Ford v. Jarossy*, 114 N.J. Super. 382, 385-86, 276 A.2d 402, 404-05 (1971). But see *Leasco Data Processing*, 66 Misc. 2d at 1090-91, 323 N.Y.S.2d at 14.

122. See Minetz, *supra* note 29, at 362.

123. U.C.C. § 1-106(1) official comment 1 (1978).

124. *Atlas Thrift*, 27 Cal. App. 3d at 1006 n.5, 104 Cal. Rptr. at 319 n.5.

125. "Credit is based on confidence that men will meet their obligations." F. WHITNEY, *THE LAW OF MODERN COMMERCIAL PRACTICES* 810 (2d ed. 1965).

126. See generally Clontz, *supra* note 103, at 364-67 (economic analysis of why creditors should be allowed to collect deficiency judgments).

tion should occur."¹²⁷

Those courts that have considered the liability of the secured party in light of the policy of the UCC to avoid the assessment of penal damages have concluded that an automatic denial of a deficiency judgment "would amount to a rejection of that policy."¹²⁸ The Nebraska Supreme Court, for example, found that "[n]o sound policy requires us to inject a drastic punitive element [denial of a deficiency judgment] into a commercial context."¹²⁹ Using similar reasoning, the Supreme Court of North Dakota concluded that the no-deficiency rule "might often cause a harsh and punitive result disproportionate to the creditor's misconduct We do not believe that the Uniform Commercial Code, which was written in the spirit of commercial reasonableness, would countenance such an onerous result without statutory language expressly mandating it"¹³⁰ For example, the drafters of the Code did include one "expressly mandat[ed]" penalty in the remedy provision of section 9-507: the minimum recovery where the collateral is consumer goods. To inject another punitive remedy, the no-deficiency rule, into a system where compensation is the rule is

127. Davenport, *Default, Enforcement and Remedies Under Revised Article 9 of the Uniform Commercial Code*, 7 VAL. U.L. REV. 265, 267 (1973).

128. Fedders Corp. v. Taylor, 473 F. Supp. 961, 978 (D. Minn. 1979).

129. Cornett v. White Motor Corp., 190 Neb. 496, 501, 209 N.W.2d 341, 344 (1973).

130. State Bank of Towner v. Hansen, 302 N.W.2d 760, 767 (N.D. 1981); see also Barbour v. United States, 562 F.2d 19, 21 (10th Cir. 1977) (UCC prohibits "penal damages"); United States v. Whitehouse Plastics, 501 F.2d 692, 696 (5th Cir. 1974), cert. denied sub nom. Baker v. United States, 421 U.S. 912 (1975) (when the secured transaction is between commercial business persons, no policy supports the punitive no-deficiency rule); First Alabama Bank of Montgomery v. Parsons, 390 So. 2d 640, 643 (Ala. App. 1980) (the UCC provides for damages, so the additional penalty on the creditor of a denial of a deficiency judgment is unnecessary); Hall v. Owen County State Bank, 175 Ind. App. 150, 166, 370 N.E.2d 918, 927 (1977) (policy of UCC is to provide "full recompense" to injured parties, not to assess penalties); Beneficial Fin. Co. v. Young, 612 P.2d 1357, 1359 (Okla. 1980) (forfeiture of the secured party's right to a deficiency judgment would be punitive in nature and thus contrary to UCC policy); Grant County Tractor Co. v. Nuss, 6 Wash. App. 866, 496 P.2d 966 (1972) (damages are available under UCC § 9-507(1); a forfeiture of the right to a deficiency judgment is an unnecessary remedy).

One commentator, Professor Anderson, has raised an interesting counterargument on this point. Recognizing that denial of a deficiency is a punitive remedy, he argues that it "is not to be condemned because of that fact. U.C.C. § 1-103 preserves the pre-existing non-UCC law unless displaced. Such prior law recognizes the right to penalize fiduciaries, such as trustees and agents, who breach their fiduciary duty. The imposition of the obligation to act in good faith and in a manner which is commercially reasonable would appear to elevate the creditor from the traditional arm's length position to that of a semi-fiduciary and to justify a punitive denial of relief." 4 R. ANDERSON, THE UNIFORM COMMERCIAL CODE, 9-504:30 (Cum. Supp. 1981). Professor Anderson, however, may be overstating the duty of good faith. As defined by the UCC, good faith encompasses a standard of "honesty in fact . . . [and] observance by the merchant of reasonable commercial standards of fair dealing." U.C.C. § 1-203 official comment (1978). This definition does not appear to raise the merchant's obligations to fiduciary status.

to legislate judicially against the UCC policy of providing compensation only.¹³¹

The no-deficiency rule, in addition to inflicting direct harm on the secured party and awarding an unjustified benefit to the debtor, works another hardship on the commercial world. When the secured party is denied the deficiency judgment, the loss he or she suffers is passed on to other credit customers in the form of higher prices, where the secured party is a merchant extending financing, or in the form of higher interest charges in the case of commercial lenders.¹³² Because the penalty is not born by the creditor, it probably does not serve to deter creditor noncompliance with section 9-504(3)¹³³ as strongly as some courts and commentators have suggested.¹³⁴ The no-deficiency rule, therefore, seems commercially unreasonable in its impact on the financial community, as well as in its effect on the principal parties to the secured transaction.

Conclusion

The no-deficiency rule adopted in *Atlas Thrift Company v. Horan* results in the effective repeal of the UCC's compensatory damage policy in the secured transaction default.¹³⁵ It is, moreover, a rule without reason. The *Atlas Thrift* court thought it was filling a gap in the UCC remedies system, but it actually imported a no longer valid precedent into that statute and created a new, punitive remedy against the non-complying secured party.¹³⁶ The rule does not supplement the UCC,

131. Both forms of relief, § 9-507(1) as the exclusive remedy and § 9-507(1) plus the rebuttable presumption as to the value of the collateral, can be reached without going beyond the language of the UCC. The rebuttable presumption result follows from "reading § 9-507(1) with reference to § 1-106(1) which provides for a liberal interpretation of remedies." 1A P. COOGAN, W. HOGAN & D. VAGTS, *supra* note 26, 936 & n.71.15. To find the no-deficiency rule, however, a court must go beyond the terms of UCC to the common law of the state, which may be quite different in form and in policy from the article 9 secured transaction.

132. See Clontz, *supra* note 103, at 364-67. Professor Clontz points out that, "[w]hile the 'elimination of deficiencies' is called by some 'spreading the loss,' the loss in question seems to be spread over all consumers who pay their debts. Thus, it becomes a 'social question' as opposed to a legal solution." *Id.* at 367.

133. The cost of losing a deficiency judgment arguably could make a lender or merchant less competitive if he or she were forced to raise credit charges or prices in order to compensate for the loss. This possibility seems somewhat attenuated, however.

134. See, e.g., *Randolph v. Franklin Inv. Co.*, 398 A.2d 340 (D.C. Ct. App. 1979); *Camden Nat'l Bank v. St. Clair*, 309 A.2d 329, 333 (Me. 1973). See generally *Denial of Deficiency*, *supra* note 15, at 661-62 (arguing that the no-deficiency rule is the best deterrent to creditor noncompliance with § 9-504(3)). But see 2 A. SQUILLANTE & J. FONSECA, *supra* note 108, at 858-59 (contending that the § 9-507(1) damages provisions are a sufficient deterrent to creditor misbehavior).

135. See *supra* note 130.

136. See *supra* notes 122-25 & accompanying text.

but replaces the secured party's unconditional right to a deficiency judgment with a penalty that neither UCC policy nor commercial realities support.

The California courts should reconsider whether the commercial debtor who defaults on a secured loan really needs the protection of the no-deficiency rule when the secured party sells the collateral without notice or in a commercially unreasonable manner. If the secured party compensates the debtor for any actual harm suffered due to the non-complying sale, the secured party has in effect approximated the commercially reasonable sale that the UCC mandates.¹³⁷ Inflicting additional penalties on the secured party furthers no commercial policy once this compensation is made.

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137. *See supra* note 109.

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